

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STATE MATERIALS, INC.

and

Case Nos. 8-CA-28582
8-RC-15431

TEAMSTERS LOCAL 377 A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Thomas M. Randazzo Esq., of Cleveland, OH, for
the General Counsel.
John M. Masters, Esq., and Basil W. Mangano, Esq.,
of Cleveland, OH, for the Charging Party-Petitioner.
Anthony Bucci, Pro Se, of Girard, OH, for the
Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried in Cleveland, Ohio on April 8 through 11, 1997, pursuant to a Complaint and Notice of Hearing (the complaint) issued by the Regional Director for Region 8 of the National Labor Relations Board (the Board) on February 27, 1997, and an amendment to the complaint issued on March 20, 1997. In addition, on February 27, 1997, the Regional Director ordered consolidated certain issues arising from the representation election in Case 8-RC-15431. The complaint, based upon an original charge in Case 8-CA-28582 filed on October 7, 1996¹ and an amended charge filed on November 12, by Teamsters Local 377 A/W International Brotherhood of Teamsters, AFL-CIO (the Charging Party or Union), alleges that State Materials, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act).

The Union's petition was filed on September 5, and sought an election among certain of Respondent's employees. An election was held, pursuant to a Stipulated Election Agreement, on October 25. The tally of ballots issued on that date shows that of approximately 37 eligible voters, 29 ballots were cast, 10 in favor of representation by the Union, 11 against, and eight were challenged. The challenged ballots are sufficient in number to affect the outcome of the election. The Union filed objections to conduct affecting the outcome of the election on November 1.

¹ All dates hereafter are in 1996 unless otherwise indicated.

Thereafter, as noted, on February 27, 1997, the Regional Director concluded that the allegations of the objections to the election along with the issues raised by the determinative challenged ballots in Case 8-RC-15431 parallel issues with the complaint allegations in Case 8-CA-28582 and ordered the consolidation of those cases for hearing before an administrative law judge. The Respondent filed an answer to the complaint on March 17, 1997, denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent discharged five employees, and engaged in numerous independent violations of Section 8(a)(1) of the Act including coercive interrogation, threats to close its business, promise of benefits to its employees, threats to decrease employees' wages and the initiation of a sign-up policy and formal written disciplinary system in retaliation for the employees union sympathies and activities. The objections to the election track the complaint and raise identical issues. Assuming the allegations in the complaint are proven, there remains for consideration the question of whether a bargaining order is the appropriate remedy or whether the representation case should be permitted to proceed.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties. The General Counsel's unopposed Motion to Strike Portions of Respondent's Brief is granted. In this regard, Respondent is not permitted to make arguments based on documents which are not in evidence. See *B & D Custom Cabinets*, 310 NLRB 817 at fn. 1 (1993).

Findings of Fact

I. Jurisdiction

The Respondent is a corporation engaged in the production and delivery of asphalt, with an office and place of business in Girard, Ohio, where it annually purchased and received goods and materials at its facility in excess of \$50,000 directly from points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

In or around December 1995, the Respondent changed its name from Black Rock to its current designation and without interruption continued to operate its facility with the same supervisory and production employees. At all material times, Frank Aquila held the position of President and Anthony "Tony" Bucci as Manager of Respondent. The status of Robert Bucci, Dan Bucci II, and John Shelton as supervisors and agents of Respondent are in dispute and will be addressed later in the decision.

Randy Anzevino, an employee, assumed the position of organizer of the Union in September 1996, and was involved in soliciting authorization cards from Respondent's employees.

B. The Union Campaign and Authorization Cards

The union campaign began on September 4, with Anzevino arriving at Solomon's Mine in advance of Respondent's truck drivers, and meeting individually with each driver while they waited to pick up sand and other materials.

Anzevino testified that he gave authorization cards to the following employees who signed the cards in his presence and returned them to him. He then gave these cards to the Union business agent. Accordingly, I admitted these cards into evidence.

Ray Alexander
James Craft
Gregg Griffin
Bonnie Kuhn
John McGuire
Jim Ragazzine
Ron Snyder
Tim Walsh

Leroy Balleu
Dan Eckman
Ken Johnson
Gary Lockner
George Mrosko
Gary Reynolds
James Thomas

Employees Kevin L. Lane and Sandra Workman a/k/a Raven Black identified their own authorization cards as did Anzevino and they were eventually given to the Union business agent.

I received all the above cards in evidence and find that each is legitimate and an expression of that employee's desire to have the Union as bargaining agent.

Thus, there is a total of 18 union authorization cards that have been received in evidence and which I have found are valid.

C. The 8(a)(1) Violations

1. Allegations concerning Tony Bucci

On the morning of September 4, Respondent dispatched all of its trucks to Solomon's Mine in order to pick up sand and other materials and deliver them back to the plant. While each of the drivers was waiting for their truck to be loaded and weighed, they individually met with Randy Anzevino and signed a union authorization card. After the loading process was completed, the drivers began to return to the plant in a caravan fashion. While the drivers were returning to the plant, a number of them, including James Thomas, overheard fellow employee Tim Walsh tell Tony Bucci over the two-way radio,² that Randy Anzevino was organizing the employees and everybody signed union cards at Solomon's Mine. Immediately upon returning to the yard, Bucci asked a number of truck drivers, "whether they had signed union cards?" Each of the drivers responded, "that they had." Employee Raven Black testified that she overheard Bucci ask three truck drivers whether they had signed union cards. She heard each of the three drivers reply that they had signed a union card and then heard Bucci tell all the drivers, to dump the sand, park the trucks

² Each of Respondent's trucks was equipped with a two-way radio in order to communicate with supervisory personnel at the plant.

and punch out. The drivers did as instructed. As the drivers were walking out of the yard, Bucci called them back and wanted to know what it would take to resolve it. A meeting was held with all the truck drivers except Gregg Griffin and Bonnie Kuhn, who experienced flat tires at Solomon's Mine and did not return to the plant with the other drivers. Tony, Robert and Dan Bucci, II, represented the Respondent at the meeting. Tony Bucci told the employees at the inception of the meeting that he wanted to work things out and wanted to know what he could do. Employee James Thomas said that all the drivers would like a little more money, some time and a half, a little bit of benefits and a reduction in some of the required work hours. Tony Bucci replied, "if the union was coming in, he was going to shut the gate and rename the company." He then said, "You guys can join the Union, but they're not going to do anything for you." "If you guys want to go back to work, I have no problem, I will give everybody a dollar an hour raise." During the meeting, Robert Bucci, when asked about benefits, reached in his pocket, threw a dollar on the ground and said, "If you want them, buy them." After the September 4 meeting ended, the majority of the drivers returned to work with some of them completing ten and eleven hour shifts according to payroll records. A number of employees did not return to work on September 5, and that issue will be discussed later in the decision. When Bonnie Kuhn, a witness called by Respondent, returned to the yard after the meeting with the truck drivers had ended, Bucci asked her, "what happened?" Kuhn testified that she told Bucci "that Anzevino was at Solomon's Mine signing the guys up for the Union."

On the next day, September 5, Tony Bucci had a conversation with employee James G. Marino and asked him how he felt about the Union. Marino testified that he told Bucci that he was for the Union and according to Marino, Bucci walked away in disgust.

On September 12, employee Kevin L. Lane attended a meeting by the garage with approximately half the truck drivers. Tony and Robert Bucci, in addition to administrative assistant Robert Kathuria, represented the Respondent. This was the first meeting, after the filing of the representation petition on September 5, that the Respondent addressed issues concerning the Union. During the course of the meeting, Lane testified that Tony Bucci said words to the effect that he would bring everybody down to \$6.50 an hour if the Union came in and would take union dues and benefits from that figure. Lane further testified that Bucci also told the employees in attendance at the meeting, "that he would give them a \$1.00 an hour more not to bring the Union in" and "that the Employer would close if the Union came in."

On October 11, the Respondent held meetings in the little room downstairs underneath the plant office to discuss facts about the upcoming Union vote on October 25. Two sessions were held with half the truck drivers in attendance at each of the morning sessions. Employee Lane testified that during the meeting he attended, Tony Bucci said, "that he would close the company if the union came in" and "that he would give the drivers \$1.00 an hour more but his attorney said he was not allowed to talk about that."

The testimony of Thomas, Lane, Marino, Black and Kuhn is unrebutted as Tony Bucci did not testify at the hearing. In this regard, Counsel for the General Counsel attempted to examine Bucci as a witness pursuant to Section 611(c) of the Federal Rules of Evidence. Bucci asserted his Fifth Amendment right and refused to respond to questions. I directed the General Counsel to ask

Bucci a number of questions to determine whether this position would be asserted on each question propounded. This approach was followed and on the simplest of questions such as "Where are you employed", Bucci continued to refuse to respond, asserting his Fifth Amendment right. I determined that no reasonable ground existed that a direct answer might prove dangerous to Bucci and compelled him to answer the questions posed by the General Counsel. See, *Mason Et Al. v. United States*, 244 U.S. 362 (1917). At all material times, Bucci refused to respond to questions propounded by the General Counsel or me.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

Employees Thomas, Lane, Marino, Black and Kuhn credibly testified concerning statements made to them by Tony Bucci. Bucci is an admitted supervisor who refused to testify. His statements are therefore undenied. I find that Tony Bucci made the statements imputed to him by the above noted employees. I further find that Bucci's statements tended to coerce employees in the exercise of their Section 7 rights and that they violate Section 8(a)(1) of the Act, as alleged in paragraphs 7(A, B, C, D, and F), 9, 11 and 12 of the complaint. See *T & J Trucking Co.* 316 NLRB 771 (1995) (threatening plant closure and discharge); *Tube-Lok Products*, 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative); *Conagra Inc.*, 248 NLRB 609, 615 (1980) (threatening employees with loss of benefits); *Marriott Corporation*, 310 NLRB 1152 (1993) (promising a wage increase during union campaign) and *House Calls, Inc.*, 304 NLRB 311, 319 (1991) (coercive interrogation).

2. The CB Radios

The General Counsel alleges in paragraphs 7(E) and 10 of the complaint that Tony Bucci ordered employees to remove CB radios from Respondent's trucks and the Respondent accorded preferential treatment to employees opposed to the Union by permitting them to keep CB radios in their trucks while requiring pro-union employees to remove their CB radios.

The sole source of testimony concerning this issue was elicited from employee Gregg I. Griffin. He commenced employment with Respondent on June 29 and signed a union authorization card on September 4 at Solomon's Mine.

Griffin testified that prior to September 4, truck drivers were permitted to have personal CB radios in their assigned truck but after that date pro-union employees were told to remove their radios. He further testified that employees who opposed the Union were able to retain their CB radios for an extra week before all employees were instructed to remove personal CB radios from their assigned truck. When asked on direct examination how he knew which employees were pro-union, Griffin replied that it was based on general discussions among the employees.

While it appears that employee CB radios were removed from Respondent's trucks after September 4, the General Counsel did not introduce any testimony of who ordered the radios removed from Respondent's trucks. Thus, there is no evidence in the record to link the removal of the radios to anyone in Respondent's supervisory chain nor was any evidence presented to establish that the removal of the CB radios was related to union activities. Under these circumstances, I can not find, as alleged by the General Counsel, that Tony Bucci ordered employees to remove CB radios from Respondent's trucks in retaliation for their union activities. Likewise, I can not find that Respondent accorded preferential treatment to employees opposed to the Union by permitting them to keep CB radios in their trucks while requiring pro-union employees

to remove their CB radios. First, there is no concrete evidence in the record to conclusively establish which of Respondent's truck drivers supported or opposed the Union. Indeed, all of Respondent's truck drivers present at Solomon's Mine on September 4, signed union authorization cards. Second, Griffin testified that sometime after September 4, all employees were directed to remove their personal CB radio from their assigned truck and while he asserted that four anti-union drivers were permitted to retain their CB radios for an extra week, there was no evidence presented as to who in Respondent's supervisory chain authorized these actions. Therefore, I find that the General Counsel has not conclusively established that the Respondent violated Section 8(a)(1) of the Act by ordering employees to remove CB radios from their trucks in retaliation for their union activities or accorded preferential treatment to employees opposed to the Union by permitting them to keep CB radios in their trucks while requiring pro-union employees to remove their CB radios, and I recommend that these allegations be dismissed.

3. The Sign-Up Policy and Formal Written Disciplinary System

The General Counsel alleges in paragraph 8 of the complaint that Tony Bucci, in or around mid-September 1996, initiated a sign-up policy which required employees to sign a notice stating the date and time that they were next required to report to work and a formal written disciplinary system in retaliation for employees' union activities.

General Counsel witness James Thomas testified on cross examination that prior to September 4, there was a formal sign-up policy in effect and he regularly received the form from Respondent's Foreman John Shelton. Likewise, Kevin L. Lane testified that although he first became aware of the sign-up form after he returned to work on September 10, other truck drivers told him that the form was previously used before September 4. Employee Clarence Huckaba testified that while he was required to use the sign-up form every day after September 4, he had signed and used it prior to that time but not on a daily basis.

With respect to the formal written disciplinary system, employee James Thomas testified that he was aware that prior to September 4 employees were written up for being late or not cleaning their trucks. Likewise, former Supervisor Norm Henninger who was employed at Respondent from March to mid-June 1996, credibly testified that the disciplinary policy was in effect during that period and authenticated several written disciplinary forms that were given to employees in April and May 1996.

Considering the testimony of these witnesses, I find that both the sign-up policy and the formal written disciplinary system was in effect prior to September 4. Thus, it cannot be established that the Respondent initiated these practices after September 4, in retaliation for employees' union activities.

Accordingly, I recommend that paragraph 8 of the complaint be dismissed.

D. *The 8(a)(1) and (3) Violations*

1. The termination of Randy Anzevino

The Respondent contends in its brief that because the amended charge filed on November 12 alleges that Randy Anzevino was terminated on September 5, and the amendment to complaint issued on February 27, 1997 alleges the termination occurred on June 8, the entire matter is time barred under Section 10(b) of the Act and should be dismissed. Contrary to this argument, I find that the charge and complaint allegations have a legally sufficient relationship, the June 8 date of termination is within six months of the original and the amended charge, and the February 27, 1997 amendment to complaint gave the Respondent ample time to prepare its defense. See *Fiber Products*, 314 NLRB 1169 (1994).

Randy Anzevino commenced work in June 1995 with Black Rock, the predecessor of Respondent, and continued as an employee of Respondent when it changed its name in December 1995. He did not work for the Respondent between January and May 23. On May 23, he filed an employment application and was rehired by Respondent to commence work on that date. On Saturday, June 1, Anzevino reported to work and saw other drivers standing in the yard rather than starting their trucks. He became aware that the drivers did not start their trucks because the license tags for both the tractors and the trailers expired on May 31. The twelve drivers including Anzevino had a meeting with Tony and Robert Bucci and told them that they refused to drive the trucks because the license tags had expired. Tony Bucci told the drivers that administrative assistant Robert Kathuria had made a mistake and forgot to get the license tags renewed. He told the drivers that the tags would be available on Sunday and asked them to drive on the back roads. The drivers in attendance at the meeting refused to drive on the back roads. Except for five drivers, who drove smaller trucks and were not impacted by the renewal issue, all of the drivers that attended the meeting with Bucci refused to work on June 1. The meeting began to disperse and while Anzevino was standing next to Tony and Robert Bucci, Tony Bucci said, "that will teach you to organize these guys." Anzevino walked away.

The payroll records show that no truck drivers worked on Sunday, June 2.

Records introduced in evidence show that except for the license tags for two trucks, all tags were renewed by the end of the day, on June 3.

Anzevino credibly testified that he went to the facility on June 3, and had a conversation with Tony Bucci. He asked Bucci whether the tags for his Truck 41 had been renewed? Bucci said, "no, there was another mix-up." Bucci then told Anzevino, "just drive on the back roads." Anzevino replied, "that he refused to do that for the rate of pay that he was being paid or to jeopardize his license." Bucci said, "If you want to work, I would drive."

On Tuesday, June 4, Anzevino reported to work but was told to come back on Thursday and Respondent would have his tags. Payroll records show that the majority of truck drivers returned to work on June 4.

Anzevino returned to work on Thursday, June 6, and went to the office. He asked Tony Bucci whether the tags had arrived? Bucci replied, "no, there has been another mix-up." "If you want to work, you'll drive the back roads." Anzevino left the office and did not work on that day.

The records show that by the end of the day on June 7, the license tags for Truck 41 had been renewed. The Respondent got in touch with Anzevino and called him back to work on Saturday, June 8. Anzevino returned to work that day and went directly to the office where he saw

Robert Bucci and Robert Kathuria. He received the license tag for the tractor but not for the trailer. Anzevino asked Bucci "where is the tag for the trailer?" Bucci replied, "We will get it." Anzevino said, "I'm not driving without my tags." "I'm not driving illegally." Bucci said, "If you want to work, you'll drive." Anzevino said, "I can work anywhere." "I don't have to work for you people" and "I don't have to work illegally." "Call me when you get your tags."

Anzevino credibly testified that he did not quit his employment at Respondent, and he was never called back to work after his conversation with Robert Bucci on June 8.

The following week Anzevino went to the Union hall and asked business agent Jerry Morrison whether the Union had ever attempted to organize the Respondent? He became aware that no one had attempted to do so and Anzevino asked if he could be involved in this endeavor. Before undertaking that assignment, Anzevino obtained a job through the Union and remained there for approximately two months. It was after the job ended that Anzevino obtained authorization cards from the Union and began the campaign on September 4 to organize Respondent's employees.

The General Counsel alleges in paragraph 14 of the complaint that Respondent caused Anzevino to terminate his employment against his will by forcing him to drive a truck that was not properly licensed and refused to call him to work when the truck was properly licensed because he engaged in concerted activities and/or he formed, joined and assisted the Union. The Respondent takes the position that Anzevino voluntarily resigned his employment effective May 31, and asserts in any event that he could not have been discriminatorily discharged in June 1996, since the Respondent did not learn about union organizing activity until September 4.

I find that Anzevino and the other eleven truck drivers engaged in concerted activity for the purpose of mutual aid and protection; specifically, to enforce safety conditions by not driving trucks that had expired license tags. To further enforce this position, none of the twelve drivers that went to see Tony Bucci on June 1 to protest the expired license tags worked on either June 1, 2 or 3. It was not until the license tags for the majority of the trucks were renewed on June 3, that those drivers returned to work on June 4. While none of those drivers was fired by Respondent for their protest, it is noted that only Anzevino engaged in one-on-one conversations with Tony Bucci about the status of his license tags. In these conversations, Anzevino repeatedly refused to drive without legal license tags and rejected Bucci's instructions to drive on the back roads. Lastly, when Anzevino was called back to the facility on Saturday, June 8, and was given the renewed tag for the tractor and told to go to work, he continued to refuse to drive because the tag to the trailer had not been renewed.³ It was after this last conversation that Anzevino was not called back for employment with Respondent. Thus, I find that Respondent discharged and did not call Anzevino back to work because he engaged in concerted activity under Section 7 of the Act and therefore violated Section 8 (a)(1). *California Oilfield Maintenance, Inc., d/b/a Robbins Engineering*, 311 NLRB 1079 (1993).

In regard to the General Counsel's alternative theory that Anzevino was constructively discharged because of his union activities and/or based on the allegation in paragraph 6 of the complaint that Toni Bucci told Anzevino on June 1, "that will teach you to organize these guys", I am not persuaded that the Act has been violated. With respect to the General Counsel's theory of termination, the two elements necessary for a constructive discharge have not been established. First, Anzevino testified that he did not quit or resign his position and second, no evidence was

³ Respondent's supervisor Norm Henninger credibly testified that to be in compliance with the law, it was necessary to have current license tags for both the tractor and the trailer.

submitted to show any knowledge by Respondent of any union organizing activity ongoing on June 1. Indeed, it was not until after Anzevino left Respondent's employ on or about June 8, that he went to the Union hall. While I am inclined to credit Anzevino's testimony that Tony Bucci made the statement imputed to him ("that will teach you to organize these guys"), I do not find, standing alone, that such a statement is threatening or coercive. As noted above, at the time the statement was made, there was no evidence of any union organizing activity ongoing at Respondent. Accordingly, I recommend that paragraph 6 and the Section 8(a)(3) allegation of the complaint regarding Anzevino be dismissed.

2. The termination of James Thomas

James Thomas, a unit employee, commenced work with Black Rock in May 1994, and continued his employment at Respondent when it changed its name in December 1995. He signed a union authorization card on September 4 at Solomon's Mine and was terminated by Respondent on September 5, for alleged insubordination and poor work performance.

Thomas credibly testified that when he returned to the yard on September 4 from Solomon's Mine, Tony Bucci asked him whether he signed a union card. Thomas replied that he had signed a union card. In the meeting that took place on that day between the truck drivers and the Respondent, it was Thomas who was the spokesperson for the employees. In response to Tony Bucci's question of what he could do to work things out, Thomas said the employees would like a little more money, some time and a half, a little bit of benefits and a cut in some of the work hours. After Thomas made that statement, Bucci said, "State Materials wasn't in business then." When the meeting broke up, payroll records show that Thomas returned to work and completed the work day.

Thomas reported to work on September 5, and was told to go home because his truck needed repair work. Thomas admitted that the truck needed a couple of front tires and the brakes needed to be adjusted but testified that these were considered minor repairs. Thomas credibly testified that he reported to work on each successive day after September 5, and was told to go home. On September 9, Thomas reported to work and was told that Tony Bucci wanted him to drive a dump truck that had been "red-tagged"⁴ Thomas waited until Tony Bucci was finished talking to another driver and walked over to where he was standing. Bucci said, "just turn around and go home, you don't want to work." After that conversation, Thomas was never called back to work at the Respondent.

In order to discern the reason or reasons for Thomas's termination, I asked Tony Bucci to state the Respondent's position for the record. Bucci initially replied that Thomas was terminated because he refused to drive a small truck and told Bucci he would not drive it because it was "red-tagged". Bucci then changed his position somewhat and apprised me that Thomas was fired on September 5 for insubordination (not driving the small truck), and for poor work performance including two accidents, the second of which caused \$7,000 worth of damage to his truck in May 1996. Thomas testified that while he did have two accidents, he was never disciplined or written up for the infractions nor did he have a history of poor work performance at the Respondent. Indeed, Respondent did not introduce any employee disciplinary reports involving these two accidents nor evidence of any prior infractions committed by Thomas.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455

⁴ The Department of Transportation puts red tags on trucks when they are unsafe or in serious condition. These trucks must be fixed before they can be driven.

U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board’s *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn.12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in terminating Thomas. First, the evidence establishes that Bucci learned of Thomas’s union activity on September 4, and specifically interrogated him about whether he signed a union card on that date. In the meeting with the truck drivers on September 4, Thomas was the chief spokesperson for the employees and told Bucci the specific economic demands the employees needed in order to work things out. Thus, there is union activity, knowledge and animus. Second, the abruptness of the termination on September 5 further supports the conclusion that the termination was unlawfully motivated.

The burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employee’s protected conduct.

In regard to the shifting reasons for Thomas’s termination, Respondent first advanced that he was terminated in part for poor work performance including being involved in two accidents with the second accident in May 1996 causing damage to his truck in the amount of \$7,000. I find the Respondent’s affirmative defense to be wholly without merit and conclude it is pretextual. In this regard, Respondent did not present any record evidence that Thomas had a history of poor work performance during his tenure of employment. Likewise, Thomas was not disciplined or written up for either of his two accidents. Therefore, I conclude that this portion of Respondent’s affirmative defense is a sham and the true reason for the termination was Thomas’s protected activity.

The second reason advanced by Respondent for Thomas’s termination was his insubordinate behavior on September 5, by refusing to drive a small truck to haul materials.

In regard to this issue, employee and mechanic Raven Black credibly testified that John Shelton gave her the paperwork for this truck prior to September 5 because one of the slack adjusters was frozen. The truck was “red tagged” due to its unsafe condition and remained in the yard area for several weeks waiting to be repaired. On September 5, the truck was still in its “red tag” status and in Black’s opinion was unsafe to drive. I conclude that Respondent seized upon Thomas’s refusal to drive the unsafe truck to support its business justification for the termination. I reject this reason because of Black’s testimony that the truck was unsafe to drive and note that when the drivers refused to drive on June 1 because of expired license tags, no discipline was imposed on any of the drivers. Significantly, unlike September 5, there was no union organizing at the facility in June 1996.

In conclusion, I find that the Respondent has failed to demonstrate that it would have taken the same action against Thomas even in the absence of his engaging in union activities. I also note that the reasons advanced for the termination shifted during the presentation of Respondent’s case and occurred at a time immediately after significant protected activity took place on the

preceding day. Under these circumstances, such actions suggest a predetermined plan to create a reason to discharge Thomas and thus rid the facility of a union activist. Further undermining Respondent's defense is evidence which demonstrates disparate treatment. As noted previously, no discipline was imposed on the truck drivers when they refused to drive the trucks on June 1, prior to any union activity, because of expired license tags. Thomas's refusal to drive an unsafe truck clearly equals the actions of the other drivers, yet he was terminated.

Accordingly, for the reasons noted above, I find that Respondent's discharge of James Thomas violated Section 8(a)(1) and (3) of the Act.

3. The termination of Kevin L. Lane

Kevin L. Lane commenced employment with the Respondent in July 1996 as a truck driver. He worked continuously from July 1996 to September 3, called in sick on September 4, but did not return to work until September 10. Since he was on sick leave, he did not sign a union authorization card at Solomon's Mine nor did he attend the truck drivers meeting at the facility that morning.

Employee Sandra Workman a/k/a Raven Black testified that she lived with Lane and decided to attend the truck drivers meeting on September 4 so she could inform Lane about what took place.⁵ After the meeting ended, Black telephoned Lane and told him he better get down to the facility because there was a lot of discussion about the Union and the drivers had signed union cards. Lane did not go to the facility; rather he went directly to the Union hall and signed a union authorization card.

On the evening of September 4, Lane telephoned Respondent and asked John Shelton what time he should be in on September 5? Shelton told Lane not to come to work but to call every morning. Lane followed these instructions and telephoned the Respondent each morning on September 6-8 (Friday-Sunday); he told Shelton on Sunday that he was going to go to the unemployment office on Monday. Shelton told Lane to call in on Monday morning and after Lane made the call, he was told to call again in the afternoon. After returning from the unemployment office, Lane called Shelton on Monday afternoon and was told to report back to work on September 10.

Lane worked 4.50 hours on September 10 and on September 11 reported 18 minutes late for work for which he was issued an employee warning disciplinary report. Payroll records show that during the weeks ending September 14, 21, 28, October 5, 12, and 19, Lane worked approximately 40 hours each week.

On October 13, Lane signed-up to start work at 8 a.m. but did not report to work on time because he had a flat tire. He was given an employee warning disciplinary report which he refused to sign.

On October 14, Lane was instructed to report to work at 5:30 a.m. but came in late. He was given his third employee warning disciplinary report which he signed.

On October 22, Lane was given his fourth employee disciplinary report for failing to report to work on Sunday and Monday, October 20 and 21 and for reporting to work on Tuesday October

⁵ Black was also terminated from Respondent and this issue will be treated later in the decision.

22 at 7:20 a.m. rather than when he was instructed to come in at 7:00 a.m. Because Lane refused to sign the employee disciplinary report, he was relieved of his job duties and advised that he would be informed of his status pending an investigation. By letter dated November 15, from Respondent's President Frank Aquila, Lane was terminated because of his unsatisfactory employment record.

Lane credibly testified that after he returned to work on September 10, both Frank Aquila and John Shelton asked him whether he signed a union authorization card⁶. He also testified that during the last week of his employment at Respondent, he regularly wore a Union hat while he was at the facility and was observed by Tony and Robert Bucci.

The General Counsel alleges in paragraph 15 of the complaint that Lane was terminated because he formed, joined and assisted the Union. The Respondent takes the position that Lane was terminated because of his unsatisfactory work record including the four employee disciplinary warning reports.

As stated earlier, the Board has indicated that the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in terminating Lane. First, the evidence establishes that the Respondent told Lane not to report to work on September 5-9, which immediately followed the truck drivers meeting about the Union organizing campaign held on September 4. While Lane did not attend that meeting, it was common knowledge among managers and employees that he was living with Sandra Workman who attended the meeting and it must be presumed that any information that she gained at the meeting would be shared with Lane. Although no evidence was elicited that the Respondent knew Lane signed a union authorization card at the Union hall on the afternoon of September 4, it was brought out by Respondent on cross examination that its managers inquired of Lane, after he returned to work on September 10, whether he signed a union authorization card. Lastly, during the last full week of employment ending October 19, Respondent observed Lane wearing a Union hat while working at the facility.

Respondent takes the position that it terminated Lane because of his unsatisfactory employment record and his disciplinary actions. I find revealing that each infraction taken against Lane took place after September 4, the date Respondent learned of the truck drivers protected activity. Lane credibly testified that prior to September 4 he had an unblemished work record and had never been written up or criticized about his work. Significantly, while Lane was late for work on several occasions prior to September 4, he was never counseled nor did he receive an employee disciplinary warning report. While Lane admitted that he was late for work on September 11 and October 14, payroll records show that he worked the remainder of those days. Lane refused to sign the October 13 employee disciplinary report because a flat tire caused him to be late for work. I note that the Respondent made no attempt to confirm this assertion which it easily could have done. While the Respondent charged Lane in the October 22 employee disciplinary report that he refused to work on Sunday and Monday, October 20 and 21, it ignored

⁶ I did not permit the General Counsel to amend the complaint for the purpose of including these allegations as independent violations of the Act because the Respondent was not apprised about these statements until the day Lane was called to testify.

the prior July 1996 agreement made by John Shelton with Lane that he did not have to work on Sundays because of personal and religious reasons. While the payroll records show that Lane worked one Sunday in October 1996, this was at the request of Respondent because of good weather and the need to complete an important job. Otherwise, the payroll records introduced in evidence show that Lane did not regularly work on Sundays in September and October 1996.

Finally, I conclude that during the week ending October 19, which was the last full week Lane worked at Respondent, his wearing of the Union hat on a continuing basis was the straw that broke the camel's back. It stands to reason that such a blatant exhibit of support for the Union, approximately one week prior to the scheduled October 25 election, would incur disfavor with Tony and Robert Bucci. Indeed, there is no dispute that the Bucci's observed Lane wearing the Union hat during the week. It was immediately after Lane reported late for work on October 22 that he was relieved of his job duties, which was the first day back since last working on Saturday, October 19.

In sum, the General Counsel presented a strong prima facie case by presenting an abundance of evidence showing that the union activity of Lane was a motivating factor in the Respondent's decision to terminate him. Respondent has failed to carry its substantial burden of showing by a preponderance of the evidence, that in the absence of Lane's union activity, the Respondent would have taken the same action. Accordingly, I find that by terminating Lane on October 22, the Respondent violated Section 8(a)(1) and (3) of the Act.

The termination of James G. Marino

James G. Marino was hired by Respondent in April 1996 as a mechanic and was terminated on September 11.

Marino was at work on September 4, and shortly after the truck drivers returned from Solomon's Mine, he became aware of the Union organizing campaign. Marino noticed, a short time later, that the truck drivers were having a meeting outside his work area and he walked over to join the meeting. Upon arriving at the meeting, Tony Bucci told him the meeting was only for truck drivers and he should return to work. Marino immediately left the meeting and went back to work.

On September 5, Marino and Tony Bucci had a conversation. Bucci asked Marino, "how he felt about the Union?" Marino replied, "that he was for the Union." Bucci then walked away.

On September 11, Marino arrived at work at 6 a.m. and parked his car in front of the mechanics shop because he had some heavy tools that needed to be returned to the shop. After he made one trip into the shop, John Shelton asked him to lock the gate. Marino drove his car to the gate area, locked the gate, and returned to the mechanic shop. He then took the remaining tools from his car into the work area. As Marino was returning to his car, he was stopped by Tony Bucci who told him he was not allowed to park his car there. Bucci brought out a pink slip and told Marino to sign it. Marino refused to sign the pink slip. Bucci told Shelton to get Marino's time card. Marino told Bucci that he would get his own time card and started toward the mechanic shop. Bucci instructed Shelton to follow Marino and told Shelton to get him out of here. Marino punched out and brought one load of his personal tools to his car which was still parked outside the mechanic shop. Marino attempted to return for the remainder of his tools but was told by Tony Bucci that he was fired and to leave the premises. Marino drove off the premises and then telephoned the Girard police department about the incident. After the police arrived and asked Bucci whether Marino could retrieve his tools, Bucci permitted Marino to remove his remaining personal tools from the shop area.

The General Counsel alleges in paragraph 16 of the complaint that Marino was terminated because he supported the Union while the Respondent contends he was fired for parking his car illegally, and for his abusive behavior during the confrontation about that incident.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in terminating Marino.

In this regard, when Marino attempted to join the truck drivers meeting on September 4 to listen to the dialogue about the Union, Tony Bucci directed him to return to work. On the very next day, Bucci asked Marino how he felt about the Union and Marino apprised him that he was for the Union.

The burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct. I find that Marino's termination would not have occurred in the absence of his protected conduct.

First, while Marino admitted that he was previously orally warned not to park his personal vehicle in the shop area, his purpose of doing so on September 11 was to return heavy tools to the work area. His car was parked in front of the shop area for approximately 15 minutes and did not interfere with any deliveries or the loading and unloading of trucks. It is noted that John Shelton, whose status as a supervisor is in dispute and will be treated later in the decision, observed Marino's car parked in front of the shop area before Bucci arrived but did not instruct Marino to move it from the premises. Lastly, Respondent did not establish any evidence of abusive behavior.

I also find revealing that prior to September 4, except for the oral warning about parking his car in the shop area, Marino had no prior discipline and an unblemished work record.

The evidence establishes that on September 4, Bucci was only aware of the truck drivers' interest in joining the Union. Indeed, the representation petition filed with the Board on September 5 initially sought a truck driver's unit and the mechanics were added at a later date. When Bucci learned on September 5 that Marino supported the Union, he set out to quash any interest or opportunity for the mechanics to join the Union. Thus, he used the illegal parking issue on September 11 to shield the true motivation and reasons for Marino's termination. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act.

5. The Termination of Sandra Workman a/k/a Raven Black

Sandra Workman was hired as a diesel mechanic at Respondent on July 22 and was terminated and not called back to work after September 4. On September 15, she changed her name to Raven Black.

On September 4, Workman was performing her assigned duties when she noticed that the trucks were coming back into the yard. As Workman was on her way back to the garage, she overheard Tony Bucci ask three of the truck drivers whether they had signed union cards. After she heard the three drivers answer yes to Bucci's question, she heard Bucci tell the drivers to park the trucks, dump the sand and punch out. Workman went to help some of the drivers remove their tools from their trucks and while she was doing this, a meeting was called by Tony Bucci. Workman went to the meeting so she could inform employee Kevin L. Lane, who was on sick leave and with whom she was living, what was discussed about the Union. During the course of the meeting, Robert Bucci asked Workman why she was there? Workman replied, "that if the meeting had to do with a pay raise, she wanted to know because she was only getting six bucks an hour and she had given her two weeks notice to quit because of only making six bucks an hour." After the meeting ended, John Shelton told Workman to clock out. Workman asked, "Why?" Shelton replied, "because of the strike, there was going to be no work." Shelton then told Workman to go home. Workman left the facility and went to the Union hall in the afternoon where she signed a union authorization card. The next day, September 5, Workman telephoned Shelton to inquire whether she should come to work. Shelton told her that the trucks were still down and they did not want her coming into work.

Workman testified that one week prior to the September 4 meeting, she told Shelton that if he could not get her a pay raise, she was giving two weeks notice of her intention to leave Respondent.

The General Counsel alleges in paragraph 17 of the complaint that Workman was terminated on September 4 because she formed, joined, and assisted the Union and/or engaged in concerted activities. The Respondent contends that Workman resigned her employment on September 4, and in any event it was not aware of any protected conduct involving Workman.

The meeting held on September 4 was called by Tony Bucci to see if he could work things out with the truck drivers once he learned that they had signed union authorization cards at Solomon's Mine. As I found earlier, Bucci during the course of the meeting promised the truck drivers a dollar an hour raise if they would withhold their support for the Union. Workman credibly testified that she initially went to the September 4 meeting to learn more about the union so she could inform Lane what took place, and after she learned about the possibility of a pay raise

announced by Tony Bucci, she responded to a question of Robert Bucci that she wanted to make more than six bucks an hour.

Immediately after the meeting ended, Shelton told Workman to punch out. In response to her question of why she should punch out, Shelton told her "that because of the strike there would be no work." On the next day, September 5, Shelton told Workman that the trucks were still down and they did not want her coming into work.

I find that the Respondent discharged Workman because she engaged in concerted activity protected under Section 7 of the Act. The action which precipitated Workman's discharge, i.e., her statement about seeking a pay increase and her support for the truck drivers was one step in her efforts and those of the truck drivers to seek a little more money, additional benefits, and time and a half for overtime.

Respondent's defense that Workman resigned her employment on September 4 does not withstand scrutiny. First, while Workman gave notice of her intention to leave Respondent, she still had one week remaining on the two weeks notice she gave to John Shelton. Second, the payroll records introduced in evidence show that the truck drivers returned to work on September 4, and completed their regular work day. Likewise, the records show that the truck drivers continued to work on a regular basis throughout the months of September and October 1996. Thus, the statement by Shelton that the trucks were still down and Workman was not needed to perform work is contradicted and without foundation.

While I conclude that Workman was terminated for an illegal reason under the Act, I cannot find in accordance with the position of the General Counsel, that it was based on her union activities. In this regard, at the time of her termination on the morning of September 4, Workman had not engaged in any union activities. As a mechanic, she did not sign a union card at Solomon's Mine and only learned about the union campaign on the morning of September 4 when the truck drivers returned from the Mine. She testified that no one in management knew that she went to the Union hall during the afternoon of September 4 and signed a union card. For all of those reasons, I recommend that the Section 8(a)(3) allegation regarding Workman be dismissed.

In sum, I find that the Respondent violated Section 8(a)(1) of the Act when it terminated Workman because she engaged in protected concerted activity. *Robert J. Moore, d/b/a B & D Custom Cabinets*, 310 NLRB 817 (1993).

6. The Written Warning and Reduction in Hours for Gregg I. Griffin

Gregg I. Griffin commenced work as a truck driver for Respondent on June 29 and continued working until November 23. Before Griffin accepted the job at Respondent, he told John Shelton that he could not work on Sundays and if that was a problem he would look elsewhere for employment. Shelton told him that would not be a problem.

On September 4, Griffin signed a union authorization card at Solomon's Mine but did not attend the truck drivers meeting on that date because he had a flat tire on the way back from the Mine. When he returned to the plant, he became aware that all the truck drivers had been fired for joining the Union, that Tony Bucci was starting a new company and the drivers were going to receive a \$1.00 an hour raise.

Griffin testified that on September 5 and 6, after coming into work, Respondent told him to go home. He also said that between September 6 and November 14, his work hours were

reduced in comparison to his work hours prior to September 4.

In mid-October 1996, Griffin testified that Tony Bucci told him that he would have to sign a paper stating that he would work every Sunday or be fired. Griffin signed the paper "under protest" but was told by administrative assistant Robert Kathuria that he could not sign in that manner and a new paper was prepared which he signed. Griffin did not have a copy of the paper.

The General Counsel alleges in paragraph 18 of the complaint that the written warning committing Griffin to work each Sunday or be terminated and the reduction of his work hours after September 4, was undertaken because Griffin joined and assisted the Union. The Respondent contends that Griffin was never given a written warning and the payroll records confirm that Griffin did not have a reduction in his work hours after September 4, nor was he required to or did he work every Sunday.

Under *Wright Line, supra*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's actions. I am not persuaded by the un rebutted testimony of Griffin that such a showing has been established.

First, Griffin testified that he was told to go home on September 5 and 6. Contrary to this testimony, the payroll records show that Griffin worked and was paid for a total of 15 hours on these days. Griffin further testified that he was forced to sign a paper stating he would have to work every Sunday or be fired. My review of the payroll records after September 4 through the week ending November 16, show that Griffin worked only one Sunday, on October 27. Considering this evidence, I do not credit Griffin's testimony that he was forced to sign a paper stating he would have to work every Sunday or be fired. Moreover, Griffin could not produce such a paper. Lastly, Griffin testified that continuously after September 4, his hours and days of work were reduced. He estimated that starting with the week of September 15, his hours went downhill and the most he worked was 35 hours each week. The General Counsel did not introduce any documentary evidence to confirm the number of hours Griffin worked either before or after September 4, and while Griffin testified that he worked 10 to 12 hours five or six days each week prior to September 4, I am suspicious of this estimate. My review of limited payroll records introduced in evidence by Respondent for the period before September 4, show that Griffin worked 36.75 hours during the week ending September 7, which is substantially below his estimate of 60 to 70 hours. After September 4, the payroll records show that Griffin worked five or six days each week on a regular basis. For example, for the weeks ending September 14, 21, and 28, he worked 47, 64.75, and 51.75 hours. The payroll records for work hours during a number of weeks in October 1996, also show that Griffin worked in excess of 40 hours each week. Thus, it cannot be established that Griffin's hours or days of work were substantially reduced after September 4. Indeed, the records confirm that Griffin regularly worked in excess of 35 hours each week after September 15, which was his estimate of the maximum hours he worked each week after that date.

I also note that other than signing a union authorization card on September 4, Griffin did not engage in any other union activity. He did not attend the truck drivers meeting on September 4 nor did he engage in any conversations about the Union with Respondent's managers.

In sum, I do not find that Griffin suffered a reduction of his work hours or days of work after September 4 nor do I find that Griffin was required to sign a paper requiring him to work every Sunday or be fired. Likewise, I do not find that Griffin's union activities were in any way related to the allegations in paragraph 18 of the complaint and I recommend that they be dismissed.

III. The Union Objections

The Union objected on a number of grounds to conduct that they claim affected the results of the election. As set forth in the Board's February 27, 1997 Order Consolidating Cases, the six Union Objections to the conduct of the election are co-extensive and encompassed by the complaint in Case No. 8-CA-28582.

Considering my earlier findings, which specifically address these allegations in the context of the allegations set forth in the complaint in Case No. 8-CA-28582, I conclude that Respondent's actions destroyed the laboratory conditions and precluded a free and fair election.

IV. The Challenged Ballots

There were eight challenged ballots during the October 25 election. Three of the challenged ballots involved the termination's of employees Sandra Workman, a/k/a Raven Black, Randy Anzevino and James Thomas. Considering my prior findings that these employees were terminated either because of protected concerted and/or union activities, I conclude that their names should have appeared on the list of eligible voters and recommend if necessary, that they be given the opportunity to vote in any subsequent election. Therefore, I overrule the challenges, direct that their ballots be counted and a revised tally of ballots issue.

A. *John Shelton*

The ballot of John Shelton was challenged by the Union because he allegedly is a supervisor. Respondent takes the position that Shelton is a mechanic and uses the tools of his trade and performs the same physical labor as expected of other mechanics. It also asserts by virtue of his experience and length of service with Respondent, he may be viewed as having additional responsibilities, but he does not exercise any supervisory functions including hiring or firing or assigning or directing the work of employees.

Randy Anzevino credibly testified that when he applied for a job at Respondent, he was interviewed and hired by Shelton. Likewise, employee James Thomas testified that he was interviewed and hired by Shelton and it was Shelton who gave him permission to put a CB radio in his truck. Gregg I. Griffin credibly testified that when he first applied for a job at Respondent he told Shelton that he could not work on Sundays because of personal and religious reasons and if this was not acceptable, he would look for work elsewhere. Shelton told Griffin that this would not be a problem. Additionally, Shelton told employee Kevin L. Lane that he did not have to work Sundays because of religious reasons. Anzevino, James G. Marino and Raven Black all testified that Shelton was the yard foreman and frequently told them what to do on a daily basis and often directed their work. Employees Marino, Thomas and Lane all credibly testified that Shelton worked out of a little office next to the garage.

Raven Black testified that after the truck drivers meeting ended on September 4, Shelton told her to clock out and go home because of the strike and on September 5, Shelton told her the trucks were still down and they did not want her to come into work. Black also testified that it was Shelton to whom she gave her two weeks notice to resign because of his inability to get her a pay raise. Likewise, employee Lane testified that it was Shelton who he called on the evening of

September 4 concerning whether he should come into work the next day. Shelton told him not to come in but to call every morning.

Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status. However, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *NLRB v. Wilson-Crissman Cadillac, Inc.*, 659 F. 2d 728 (6th Cir. 1981).

In my opinion, the General Counsel has established that Shelton possessed authority to use independent judgment with respect to the exercise of some of the specific authorities listed in Section 2(11) of the Act. For example, Shelton was involved in the interviewing and hiring of employees at Respondent and informed two employees that they did not have to work on Sundays to retain their employment status. Such actions definitely require the use of independent judgment. Shelton was known to employees as the yard foreman and worked out of a small office near the garage. He assigned work to a number of employees and often directed them in the performance of their job duties. He instructed employee Raven Black to clock out and go home because of the strike and informed employee Kevin L. Lane not to come in for work on September 5, and to call each morning as to whether work was available.

Accordingly, I conclude that Shelton is a statutory supervisor and recommend that the challenge to his ballot be sustained. *Joan Doeber, d/b/a Debber Electric*, 313 NLRB 1094 (1994).

B. John C. and John E. Berardi

The ballots of John C. and John E. Berardi were challenged by the Union because it was alleged that neither individual was employed by Respondent. The Respondent contends that both individuals are part-time mechanics and are employed on a regular basis.

There was not a great deal of testimony introduced at the hearing concerning the Berardis. While the General Counsel elicited testimony from a number of employees concerning their status, the Respondent did not call the Berardis to testify nor did it introduce payroll or other personnel records to support their employee status.

Truck driver James Thomas testified that the Berardi family owned a garage repair shop in North Lima, Ohio and John C. and John E. Berardi worked in the family business. Respondent mechanics James G. Marino and Raven Black credibly testified that during their employment at Respondent, they never saw or worked with John C. or John E. Berardi in the mechanic shop. They both testified, however, that on occasions some of Respondent's trucks were sent to the

Berardis garage for repair. Marino further testified that he once attempted to repair a crane and after examining it, determined that the injectors had come loose and he was unable to repair it. In order to correct the problem, Respondent hired the Berardis who came to the facility and completed the job. Bonnie Kuhn, a truck driver called to testify by Respondent, stated that she was aware that the Berardis were called to the plant to repair a damaged conveyer. She also testified that the Berardis did some welding at the plant on several occasions. She could not state, however, that she saw John C. or John E. Berardi on a regular basis at the facility or that they were regular part-time employees of Respondent.

Prior to the hearing in this matter, the General Counsel served a subpoena duces tecum on Respondent and during the initial stages of the proceeding, Tony Bucci agreed to turn over certain documents to the General Counsel. As is pertinent here, the Respondent agreed to turn over the personnel files, job classifications, and all payroll records for the Berardis. Unfortunately, these materials were not turned over to the General Counsel during the course of the hearing. I find that such records are necessary and relevant and should have been turned over to the General Counsel. The Respondent's refusal to provide these documents leads me to conclude that they would be adverse to its interests. Based on that fact and in conjunction with the credible testimony of the above noted employees that the Berardis did not work in the mechanic shop on a regular basis nor were they observed on the premises with any degree of consistency, I find that John C. and John E. Berardi were not regular part-time employees of Respondent. I further find that it is reasonable to conclude that the Berardis are independent contractors to whom trucks and other machinery is sent on a case by case basis for repairs, the majority of which is performed at the Berardis garage and not on Respondent's premises. *See Schoolman Transport System, Inc.*, 319 NLRB 701 (1995). Therefore, I recommend that the challenges to their ballots be sustained.

C. Dan (Dave) Bucci, III

The Board Agent challenged the ballot of Dan (Dave) Bucci III, because his name did not appear on the list of eligible voters. The Union takes the position that Bucci is a heavy equipment operator and is related to one of Respondent's owners, Dan Bucci II, his father. The Respondent asserts that Bucci is a mechanic and is eligible to vote in the election.

The Respondent did not call Bucci as a witness nor did it provide the General Counsel with any subpoenaed documents involving his personnel files or job classification. Raven Black credibly testified that Bucci was not a mechanic and she never worked with him in the shop. Rather, she saw him drive a front loader. Another witness called by the Respondent, Clarence Huckaba, Sr., testified that Bucci is not a mechanic at Respondent's facility.

Although the Union alleges that Bucci is the son of Dan Bucci II, one of the owners of Respondent, there was no evidence introduced to conclusively establish that he was an owner of Respondent. While Dan Bucci II, attended the September 4 truck drivers meeting, he did not participate in the dialogue and according to employee witnesses did not make any statements during the course of the meeting. Likewise, the testimony of James Thomas that Dan Bucci II, signed his pay checks is not conclusive evidence to establish that he is an owner of Respondent nor is it consistent with the testimony of other witnesses who asserted that Frank Aquila signed employees' pay checks. Thus, the record evidence is inconclusive to exclude Bucci as an eligible voter based on his relationship to Dan Bucci II.

The parties stipulated that the appropriate unit in this case is all truck drivers and mechanics employed at the Respondent. I conclude that the Respondent did not provide the General Counsel with the subpoenaed documents relating to the status of Bucci because they would be adverse to its interests. Relying on that fact and based on the unrebutted testimony of

employees Black and Huckaba, I find that Bucci is neither a mechanic nor a truck driver at Respondent's facility. Since Bucci drives a front loader, he does not hold a position included in the parties stipulated appropriate unit, and therefore, I recommend that the challenge to Bucci's ballot be sustained.

D. Bruce Pierce (Piene)

The ballot of Bruce Pierce (Piene) was challenged by the Board agent conducting the election since his name did not appear on the list of eligible voters. The Union has taken the position that Pierce is a supervisor while the Respondent alleges that he is employed as a truck driver.

At the hearing before me, there was no evidence proffered to indicate that Pierce was either a supervisor or a truck driver. I find that a prima facie showing was made that Pierce was not eligible to vote since his name did not appear on the list of eligible voters and, as no countervailing evidence was offered to rebut that showing, I recommend that the challenge to his ballot be sustained. See *Romal Iron Works Corp.*, 285 NLRB 1178, 1185 (1987).

I note that it is likely that the challenged votes cast by the three discriminates discussed above will be in favor of representation by the Union and, in that event, the challenged ballot of Pierce will not be determinative.

In sum, I recommend that the ballots of Sandra Workman, a/k/a Raven Black, Randy Anzevino and James Thomas be opened and counted, and that a revised tally of ballots issue. If the revised tally of ballots shows that a majority of votes has been cast for the Union, then the Regional Director for Region 8 should issue a certification of representative. If the revised tally shows that a majority has not been cast for the Union, the election shall be set aside.

V. The Representation Case and the Gissel Remedy

With the finding of Section 8(a)(1) violations and co-extensive objectionable conduct occurring prior to the October 25 election, I conclude that the election was conducted in an atmosphere that precluded a fair election and the results of the election must be set aside.

The question remains whether a rerun election could validly demonstrate the sentiments of the unit employees or whether a bargaining order is more appropriate.

In determining whether a bargaining order is warranted to remedy the Respondent's unfair labor practices, it is appropriate to apply the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). There the Court identified two categories of cases in which a bargaining order would be appropriate absent an election. The first category of cases involves "exceptional cases" marked by unfair labor practices that are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede election processes." In this second category of cases, the Court reasoned that the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed [by cards] would on balance, be better protected by a bargaining order." *Id.* at 613, 614-615; *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989).

In this case, the Respondent's misconduct involves the type of severe and pervasive coercion that has lingering effects and that is not readily dispelled by time. The participation of the Respondent's top management "show[s] that it is deeply committed to its anti-union position, a commitment from which it is not likely to retreat." *Salvation Army Residence*, 293 NLRB 944, 945 (1989) *enfd.* 923 F.2d. 846 (2d Cir. 1990). The continuing presence of Tony Bucci as the Respondent's principal manager and chief spokesperson will only serve to reinforce in the minds of the employees the lingering effects of the Respondent's violations.

The many unfair labor practices attributed to Tony Bucci occurred within a short timespan, and commenced immediately after the Respondent had learned of the union organizing campaign. In fact, the discharge of James Thomas strategically came immediately after he served as the truck drivers spokesperson at the September 4 meeting and presented the demands of the employees to resolve the matter. The Respondent's unlawful conduct, by Tony Bucci, encompassed a wide range of activity, including coercive interrogation, threats of discharge and plant closure, a decrease of wages, loss of work and a promise of a wage increase. Four employees, approximately 20 percent of a small bargaining unit, were direct targets of this illegal conduct.

Furthermore, even if the Respondent's conduct does not fall within *Gissel* category one, the unfair labor practices certainly qualify as "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *Gissel Packing*, *supra* at 614. Thus, the discharge of union adherents has long been considered a clear violation of the act because of its lasting effect on the election process. The Board has found that such "hallmark" violations committed by high company officials in a small unit have a tendency to undermine majority strength and impede the election process. *Airtex*, 308 NLRB 1135 (1992). Likewise, the Board has held with court approval that threats of plant closure and discharge are "hallmark" violations which are "among the most flagrant" of unfair labor practices. *Action Auto Stores*, 298 NLRB 875 (1990) (citing *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (6th Cir. 1988), *enfg.* 287 NLRB 796 (1987)).

Under these circumstances, I conclude that the possibility of erasing the effects of the Respondent's unfair labor practices by traditional remedies, and the conducting of a second rerun election is slight. I further find that the employee's representational desires, as expressed by authorization cards would, on balance, be better protected by a bargaining order and that, therefore, a bargaining order is warranted under either category one or two of the *Gissel* standard.⁷

In sum, I find that a bargaining order is appropriate in the circumstances of this case.

⁷ I find that 18 of 24 employees in the appropriate Unit signed authorization cards as of September 4. Thus, in agreement with the General Counsel, I conclude that a majority of the Unit signed valid authorization cards and designated the Union as their representative for the purposes of collective bargaining with Respondent. I also grant the General Counsel's request to withdraw the portions of the complaint alleging certain violations of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truck drivers and mechanics, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

4. Commencing about September 4, 1996, and continuing thereafter, the Union was designated by a majority of Respondent's employees in the bargaining unit described above as the exclusive collective-bargaining representative.

5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees concerning their union sentiments, threatening not to give work to employees who promoted the Union, threatening to terminate employees and to close the facility, threatening employees with a decrease in wages and loss of their jobs and offered employees a wage raise to discourage them from engaging in union activities.

6. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by discharging employees Randy Anzevino and Sandra Workman a/k/a Raven Black for engaging in protected concerted activities and Section 8(a)(1) and (3) of the Act by discharging employees James Thomas, Kevin L. Lane and James G. Marino for engaging in union activities.

7. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the appropriate unit set out above on and after September 4, 1996, while engaging in the unfair labor practices set out above, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

8. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees James Thomas, Randy Anzevino, Sandra Workman a/k/a Raven Black, Kevin L. Lane and James G. Marino, it must offer each of them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act and that a bargaining order is appropriate in the circumstances of this case, consistent with the Board's policy

set forth in *Gissel*, supra, I shall recommend that the bargaining order be made effective from September 4, 1996, the date of the Union's majority status.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, State Materials, Inc., Girard, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) interrogating employees concerning their union membership, sympathy and activity.

(b) threatening employees with closure of the facility in retaliation for the employees' union activities.

(c) threatening employees with loss of work in retaliation for their union activities.

(d) offering employees a wage raise in order to discourage them from engaging in union activities.

(e) informing its truck drivers that they had been terminated for engaging in union activities.

(f) threatening employees with a decrease in wages if they selected the Union as their bargaining representative.

(g) threatening employees with loss of their jobs should they select the Union as their bargaining representative.

(h) Discharging or otherwise discriminating against any employee for supporting Teamsters Local 377 A/W International Brotherhood of Teamsters, AFL-CIO, or any other union.

(i) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees James Thomas, Randy Anzevino, Sandra Workman a/k/a Raven Black, Kevin L. Lane and James G. Marino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole employees James Thomas, Randy Anzevino, Sandra Workman

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a/k/a Raven Black, Kevin L. Lane and James G. Marino for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Recognize and, on request, bargain in good faith with Teamsters Local 377 A/W International Brotherhood of Teamsters, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit set forth below, and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

All truck drivers and mechanics, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges or written warnings and notify the employees in writing that this has been done and that the discharges or written warnings will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Girard, Ohio, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 7, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is Further Ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

It is Further Ordered that the ballots of employees Sandra Workman, a/k/a Raven Black, Randy Anzevino and James Thomas be opened and counted, and that a revised tally of ballots issue in Case 8-RC-15431.

It is Further Ordered that should the revised tally of ballots show that a majority of votes

⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

has been cast for the Union, then the Regional Director for Region 8 shall issue a certification of representative. If the revised tally shows that a majority has not been cast for the Union, the election shall be set aside.

Dated, Washington, D.C. June 17, 1997

Bruce D. Rosenstein
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge and closure of our business if the employees select Teamsters Local 377 A/W International Brotherhood of Teamsters, AFL-CIO, the Union, as their bargaining representative, coercively interrogate our employees about union activities, threaten employees with loss of work in retaliation for their union activities, offer employees a wage raise in order to discourage them from engaging in union activities and threaten our employees with loss of their jobs or a decrease in wages if they select the Union as their bargaining representative.

WE WILL NOT discriminatorily discharge our employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James Thomas, Randy Anzevino, Sandra Workman a/k/a Raven Black, Kevin L. Lane and James G. Marino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to unlawful discharges or written warnings for James Thomas, Randy Anzevino, Sandra Workman a/k/a Raven Black, Kevin L. Lane and James G. Marino, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or written warnings will not be used against them in any way.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

The appropriate bargaining unit is as follows:

All truck drivers and mechanics, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act, and all other employees.

STATE MATERIALS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086, Telephone 216-522-3740.

JD-105-97
Cleveland, OH

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STATE MATERIALS, INC.

(Employer)

Dated _____ By

(Representative)

(Title)

1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086, Telephone 216-522-3740.